IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

TWOHY BROTHERS COMPANY,
a corporation,
Plaintiff in Error,

vs.

WALTER ROGERS,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

RICHARD E. SLOAN,
C. R. HOLTON and
E. G. SCOTT,
Attorneys for Plaintiff
in Error.

United States
Circuit Court of Appeals
Ninth Circuit

TWOHY BROTHERS COMPANY,
a corporation,
Plaintiff in Error,

vs.

WALTER ROGERS,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

This is a writ of error directed to the United States District Court for the Northern District of Arizona to review the judgment entered in said Court upon a verdict of a jury returned on the Twenty-fifth day of May, 1923 in favor of defendant in error and against the plaintiff in error.

STATEMENT OF THE CASE

This cause was originally instituted by the defendant in error in the Superior Court of the State of Arizona, in and for the County of Maricopa, on or about the Twenty-third day of April, 1921. Thereafter and within the time prescribed by law, upon a petition by plaintiff in error duly and regularly filed and the giving of bond, said cause was removed to the United States District Court for the District of Arizona upon the ground of diversity of citizenship, the defendant, Twohy Brothers Company, being a citizen and resident of a state other than the State of Arizona, i. e. a citizen and resident of the State of Oregon. The complaint as filed in said Superior Court of the State of Arizona, County of Maricopa, and as removed to said United States District Court alleged in substance that the defendant company was at the times mentioned therein engaged in the construction and building of public highways in the County of Maricopa, State of Arizona, and particularly that certain portion of the public highway known as the Indian School Road in said County and State. That the plaintiff was employed by said defendant and that his duties as such employee were to assist in connecting and making fast what is known and called in said business as a "bale" to cars or buckets loaded with sand, gravel and cement and to assist in guiding said bale and holding the same in its proper place while said sand, gravel and cement were being loaded into what is

known and called a "skiff", used for the conveyance of sand, gravel and cement to what is known as the "mixer." That on or about said date while plaintiff was about the course of his employment and without any negligence on his part, the plaintiff at said time and place received great and severe bodily strain and internal injuries, to-wit, a sprained back, a dislocation of the fifth lumbar vertebra, a severe rupture and hemorrhoids. That said injuries were caused solely by the neglect, fault, carelessness and negligence of the defendant company in this; that it did then and there at said time and place fail and neglect to properly place and locate said bale and said mixer in said highway as aforesaid, in that plaintiff was compelled in the performance of his regular duties and employment to push, haul and pull said bale. Said complaint further alleged that by reason of said injuries so received plaintiff suffered extreme bodily pain. That prior to the date of said injuries plaintiff enjoyed the best of bodily health and that since said injuries and as a consequence thereof plaintiff has been and is sick, sore and in ill health and unable to walk without assistance and without experiencing bodily pain and anguish and unable to engage in any gainful occupation and that he will remain forever maimed and crippled thereby. Said complaint prays damages in the sum of Twenty Thousand Dollars and for costs.

That on or about the Twenty-first day of May, 1921, the plaintiff filed with the Clerk of said

United States District Court what purported to be a first amended complaint containing two alleged causes of action; the first cause of action being a repetition of the allegations contained in plaintiff's original complaint, with a few minor and inconsequential changes which we do not deem necessary to note herein. Plaintiff's second cause of action in said amended complaint reiterated substantially the same facts and circumstances surrounding the accident complained of but charges that the occupation in which plaintiff was at said time engaged was hazardous as declared in Subdivision 10 of Section 3156, Chapter VI. Civil Code of Arizona, and specifically averred that said second cause of action was brought under what is known as the Employers' Liability Law of the State of Arizona. That said accident occurred while said plaintiff was engaged in and about the performance of his regular duties in and about said plant, machinery and appliances and that said accident arose out of and in the course of such duties, labor, service and employment and was due to a condition of such employment. That while so employed with his duties in and about said plant, machinery and appliances as aforesaid and while in the exercise of due care for his own safety and without carelessness or negligence on his part and while said plaintiff at said time and place was laboring under severe bodily and physical strain, to-wit, pushing, pulling and hauling upon said bale, which said bale was then and there connected with said car or bucket loaded with sand, gravel and

cement as aforesaid, he then and there met with the accident complained of. Plaintiff in his first amended complaint prays for judgment in the sum of Twenty Thousand Five Hundred Dollars.

That after the filing of said first amended complaint the defendant filed, among other pleadings, a motion to strike all of said second cause of action of plaintiff's first amended complaint upon the ground that the plaintiff having filed his original complaint under the common law had elected to pursue such remedy exclusively and that, therefore, the second cause of action of said first amended complaint being an attempt to charge liability on the part of the plaintiff in error under the Employers' Liability Law of the State of Arizona was surplusage and should be stricken. This motion to strike was by the Court denied and defendant in error was by an order of the Court duly entered granted leave to amend his complaint by adding a second cause of action under the Employers' Liability Law of the State of Arizona.

That thereafter and on or about the Twelfth day of December, 1921 the defendant in error filed a notice and motion for leave to amend together with an affidavit in support thereof, together also with his proposed second amended complaint. That said proposed second amended complaint was in all essential details a repetition of the second cause of action of the first amended complaint. It charges that the occupation in which defendant in error was employed at the time of his accident was hazardous as

declared and determined by Subdivision 10, Sec. 3156, Chapter VI, Civil Code of Arizona, 1913, and avers that said action is brought under said Section and Chapter. It differs from the second cause of action of the first amended complaint only in the allegations concerning the nature and severity of the injuries alleged to have been sustained. The second amended complaint omits entirely the first cause of action set forth in the first amended complaint, that is to say, it omits the cause of action under the common law based upon negligence, and attempts only to state a cause of action under the Employers' Liability Law of the State of Arizona.

The plaintiff in error objected to the filing of said amended complaint upon the ground that said defendant in error having brought his original action under the common law had thereby elected to prosecute his action under said law and was thereby excluded from amending by stating a cause of action under said Employers' Liability Law.

The Court, however, overruled said objection and entered its order permitting the defendant in error to file his proposed second amended complaint and giving the plaintiff in error ten days within which to answer said amended complaint.

Thereafter and on or about the Twentieth day of December, 1921 the plaintiff in error filed its motion to strike said second amended complaint upon the ground that said defendant in error had by bringing his original action under the common law, elected to pursue such remedy exclusively and was

precluded from amending his complaint so as to bring his action under said Employers' Liability Law, and that, therefore, said second amended complaint was wholly surplusage and should be stricken. Said motion to strike was by the Court denied.

Thereafter and on or about the 17th day of July, 1922 the defendant in error filed his notice and motion for leave to amend, together with an affidavit in support thereof, together also with his proposed third amended complaint, to which motion plaintiff in error filed written objections on or about the Twenty-fifth day of July, 1922, said objections by plaintiff in error being based upon the ground that the affidavit of defendant in error in support of his motion for leave to amend was insufficient to warrant the Court in granting said motion, that the third amended complaint did not conform nor was it in accordance with the affidavit in support of said motion, and upon the further ground that at the commencement of said action defendant in error elected by filing his complaint in the Superior Court of the State of Arizona in and for the County of Maricopa under the common law, to pursue such common law remedy exclusively and that defendant in error was bound by such election. The trial court, however, granted said motion to amend and made its order permitting the filing of said third amended complaint.

Beginning on or about the Twenty-first day of May, 1923, said cause was tried upon the third amended complaint before the Court and a jury and

on the Twenty-fifth day of May, 1923 said jury returned a verdict in favor of the defendant in error and against the plaintiff in error in the sum of $5,250.00, and upon said last mentioned date judgment was rendered by the Court upon said verdict.

That at the beginning of the trial of said cause counsel for defendant in error announced that he was proceeding under the third amended complaint on file in said action, whereupon counsel for the plaintiff in error objected to the introduction of any evidence under said third amended complaint upon the ground that the action as originally commenced was based upon the alleged negligence of plaintiff in error and sought a recovery upon the theory of negligence, and that subsequently the complaint was amended in such manner that now under said third amended complaint, plaintiff seeks recovery under what is known as the Employer's Liability Law of the State of Arizona. An objection to the same effect was made by counsel for plaintiff in error at the beginning of the introduction of evidence by defendant in error, which objection was by the Court overruled and it was stated by the Court that said objection should go to all the testimony that was introduced and that the same ruling would be considered as having been made and excepted to.

Thereafter plaintiff in error moved for a new trial upon the following grounds:

That the court erred in admitting evidence over

the objection of the defendant and excepted to by the defendant.

That errors of law occurred at the trial and during the progress of the cause.

That the court erred in instructing the jury.

That the court erred in refusing instructions requested by the defendant.

That the verdict is not justified by the evidence and is contrary to law.

which said motion was on the Second day of June, 1923, overruled, and it is from the order overruling said motion for a new trial and from the judgment rendered in this case as aforesaid, upon which this writ of error is based.

ASSIGNMENTS OF ERROR.

ASSIGNMENT NO. I.

The Court erred in denying defendant's motion to strike from the files the second cause of action set forth in plaintiff's First Amended Complaint for the following reasons:

That the plaintiff, a workman, brought suit in the Superior Court of Maricopa County, Arizona, against the defendant, his employer, asking in his original complaint for damages for personal injuries alleged to have been sustained while in the service of such employer and based such action upon the alleged negligence of the defendant under the common law. An employee who is injured in the course

of his employment in what is designated by such law as a hazardous occupation has open to him three separate and distinct avenues of redress, any one of which he may pursue. They are: The common law liability for negligence; The Employers' Liability Law, and the Compulsory Compensation Law.

The law of the State of Arizona, however, provides that any suit brought by the workman for a recovery shall be held to be an election to pursue such remedy exclusively. The plaintiff having chosen to bring his action originally under the common law has, under the Arizona statute, elected to pursue that remedy exclusively and is precluded fom a recovery under any of the other remedies theretofore open to him. The second cause of action set forth in plaintiff's First Amended Complaint attempts expressly to state facts bringing it within the Employers' Liability Law of the State of Arizona.

Inasmuch as plaintiff was precluded from a recovery under such Law the said second cause of action constitutes surplusage and should have been stricken and the Court erred in refusing to strike the same.

ASSIGNMENT NO. II.

The Court erred in denying defendant's motion to strike all of plaintiff's Second Amended Complaint from the files for the following reason:

In plaintiff's Second Amended Complaint he aban-

dons entirely his cause of action under the common law and seeks recovery entirely under the Employers' Liability Law of the State of Arizona. As shown in Assignment No. I. it is our theory that the plaintiff was precluded from bring his action under the Employers' Liability Law and for that reason his Second Complaint was surplusage and should have been stricken.

ASSIGNMENT NO. III.

The Court erred in denying defendant's motion to strike from the files plaintiff's Third Amended Complaint for the following reason:

Such Third Amended Complaint seeks recovery under the Employers' Liability Law. The only difference between the Second Amended Complaint and the Third Amended Complaint is a change in the amount sought and some difference in the injuries alleged to have been sustained. As stated in former assignments, our contention is that the plaintiff is precluded from bringing his action under the Employers' Liability Law and therefore his Third Amended Complaint constitutes more surplusage and should have been stricken.

ASSIGNMENT NO IV.

The Court erred in overruling defendant's objection to the introduction by the plaintiff of any testimony under said Third Amended Complaint for the reason that said objections were specifically based

upon the ground that the plaintiff having instituted suit against the defendant under the common law had made his election to pursue such remedy exclusively and was precluded under said Third Amended Complaint which, as above shown, was based upon the Employers' Liability Law of the State of Arizona.

ASSIGNMENT NO. V.

The Court erred in refusing to give the following instruction requested by the defendant;

> The plaintiff having failed to prove his case, you are instructed to return a verdict for the defendant.

for the following reason:

The plaintiff announced at the opening of the case that he was proceeding to trial upon the Third Amended Complaint, and in truth and in fact did proceed during the trial upon said Third Amended Complaint, which said Amended Complaint was, as above shown, based upon the Employers' Liability Law of the State of Arizona and not upon the common law of the State of Arizona and not upon the common law liability.

That the plaintiff having offered no evidence in support of his action originally instituted under the common law should not be permitted to recover under proof of facts set forth in his complaint based upon the Employers' Liability law, for the reason

that under our theory of the case plaintiff was precluded from pursuing any remedy other than that originally adopted and therefore the Court erred in refusing the instruction for a directed verdict.

ASSIGNMENT NO. VI.

The Court erred in instructing the jury in the following language:

> The action is based upon what is known as the Arizona Employers' Liability Act.
>
> Under the Arizona Employers' Liability Act, the plaintiff, in order to recover, must show; first, that the plaintiff was in the employ of the defendant; second, that the master was engaged in one of the hazardous occupations which I will explain to you by reading the Arizona statutes upon the subject, and that the employment by the master of the servant, that is, the plaintiff in this case, was in such a hazardous occupation.
>
> Under the law of the State of Arizona, the Employers' Liability Act, the labor and service of a workman at manual and mechanical labor in the employment of any person, firm, association, company or corporation in mills, shops, works, yards, plants and factories where steam, electric or any other mechanical power is used to operate machinery and appliances in and about such premises is service in a hazardous occupation within the meaning of said Em-

ployers Liability Act. The Employers' Liability Act covers other occupations but you are concerned solely with the question as to whether or not the plaintiff was employed by the defendant and engaged in labor and service in and about a plant, works or yards where mechanical power was used to operate machinery and apparatus in and about such premises.

and in further instructing the jury as follows:

Prior to the passage of the Employers' Liability Act, the master was liable only where the master had been guilty of some negligence. Otherwise, there was no liability. Under the Employers' Liability Act, that law has been changed and in order for a plaintiff to recover, he does not have to show that his injury, if any injury is proved, was caused by an accident due to the negligence of the master(defendant). In other words, in this case, in order to entitle the plaintiff to recovery, it is not necessary that the plaintiff should prove that the defendant, Twohy Brothers, was negligent in some manner or form.

and in further instructing the jury as follows:

You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that on or about the 25th day of March, 1921, the plaintiff, Walter Rogers, was

> in the employ of and was employed by the defendant, Twohy Brothers, at and in their mill, shop, works, yard, plant or factory where mechanical power was used, as heretofore stated and defined in the Employers' Liability Act of Arizona, and that his duty under such employment required him to be in and about such place and in the performance of his duty under such employment the said Walter Rogers, without any negligence on his part, received any personal injury, as alleged in his complaint herein, which injury was occasioned by an accident arising out of and in the course of his labor, service and employment and was due to a condition or conditions of plaintiff's occupation or employment, then the court instructs you that under those facts, if you find them to be facts, that plaintiff is entitled to a verdict against the defendant in some amount of money which would be reasonably sufficient in dollars and cents to compensate the plaintiff for the injuries thus sustained by him.

for the reason that all of the foregoing instructions are based upon the Employers' Liability Law. The plaintiff having brought his action originally under the common law and by so doing having elected to pursue such remedy exclusively is not entitled to a recovery under the Employers' Liability Law. The foregoing instructions being based entirely upon

the Employers' Liability Law and directing a recovery upon proof of such facts were erroneous.

ARGUMENT.

All of the foregoing assignments of error will be considered together for the reason that they all go to the same basic principle, i. e., that the defendant in eror having instituted his suit for damages for personal injuries under the common law, thereby made his election of remedies and was excluded from changing his action, and that the Court in permitting an amendment whereby he substituted an action under the Employers' Liability Law, and in permitting him to go to trial upon such action and in rendering judgment thereon, committed errors which impel a reversal of this action.

REMEDIES OF A WORKMAN WHEN INJURED WHILE ENGAGED IN AN OCCUPATION DECLARED AND DETERMINED TO BE HAZARDOUS.

It becomes necessary to determine what actions were available to the defendant in error before he instituted his suit, and in so doing an examination of the Constitution of the State of Arizona and the statutes enacted in conformity with certain mandates therein, is enlightening.

Article XVIII of the Constitution of the State of Arizona is entitled "Labor" and contains all of the

organic law of the State of Arizona upon that subject.

Section 7 of said Article XVIII of the Constitution contains a mandate requiring the Legislature to enact an Employers' Liability Law, and reads as follows:

> "SECTION 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employer's Liability law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

Section 8 of said Article contains a mandate requiring the Legislature to enact a Workman's Compulsory Compensation law, and reads as follows:

> "SECTION 8. The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the

Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any affecting such employment; Provided, that it shall be optional with said employee to settle for such such compensation, or retain the right to sue said employer as provided by this Constitution."

EMPLOYERS LIABILITY LAW.

Complying with the mandate contained in Section 7, above quoted, of the Constitution, the Legislature of the State of Arizona enacted Chapter VI Title 14, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law of the State of Arizona, being Sections 3153 to 3162 inclusive, Revised Statutes of Arizona, 1913.

Section 3153 declares the act to be an Employers' Liability Law as prescribed by Section 7, Article XVIII of the State Constitution.

Section 3154 is as follows:

"That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the state constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the nepligence of the employee killed or injured."

Section 3155 is as follows:

"The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the

workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein."

Section 3156 enumerates the various occupations declared to be hazardous within the meaning of the Act.

Section 3157 requires the employer to adopt rules for the safety of employees.

Section 3158 is as follows:

"3158 When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and, if none, then to his personal

representative for the benefit of the estate of the deceased."

Section 3159 modifies the defenses of contributory negligence and assumption of risk.

Section 3160 makes contracts against liability void.

Section 3161 provides the rate of interest pending appeals.

Section 3162 fixes the limitation of actions under the act to two years.

WORKMEN'S COMPULSORY COMPENSATION LAW.

Complying with the mandate contained in Section 8, above quoted, of the Constitution, the Legislature enacted Chapter VII, Title 14, of the Revised Statutes of Arizona, 1913, being Sections 3163 to 3179 inclusive, of said Statutes.

Section 3163 declares the act to be a Workman's Compulsory Compensation Law as provided by Section 8, Article XVIII of the State Constitution.

Section 3164 is as follows:

"3164. Compulsory compensation shall be paid by his employer to any workman engaged in any employment declared and determined as in the next section hereof (as provided in Sec. 8 of Article XVIII of the State Constitution) to be especially dangerous, whether said employer

be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment."

Section 3165 enumerates the various employments declared to be especially dangerous within the meaning of the act.

Section 3166 is as follows:

"3166. In case such employee or his personal representative shall refuse to settle for such compensation (as provided in Sec. 8 of Article XVIII of the State Constitution) and chooses to retain the right to sue said employer, (as provided in any law provided for in Sec. 7, Article XVIII of the State Contintution) he may so refuse to settle and may retain said right."

Section 3167 refers to the degree of care to be exercised by employers in protecting the safety of employees.

Section 3168 declares the common-law doctrine

of no liability without fault to be abrogated in Arizona insofar as it shall be sought to be applied to accidents mentioned in the Act.

Section 3169 is as follows:

"3169. When, in the course of work in any of the employments described in the third section above, personal injury by accident arising out of and in the course of such labor, service, or employment, is caused to or suffered by any workman engaged therein, by any risk or failure specified in section 66 (Par. 3164) hereof, then such employer shall be liable to and must make and pay compensation to the workman injured, and his personal representative, when death ensues, for the benefit of the estate of the deceased, for such injury at the rates and in the manner hereinafter set out in this chapter;

Provided, that the employer shall not be liable under this chapter in respect of any injury which does not disable the workman for a period of at least two weeks after the date of the accident from earning full wages at the work at which he was employed, at the time of the injury; and provided, further, that the employer shall not be liable under this chapter in case the employee refuses to settle for such compensation and retains his right to sue as provided in section 68 (Par. 3166) of this title."

Section 3170 prescribes the schedule of compensation to be paid under the Act.

Section 3171 relates to medical examinations of injured workmen.

Section 3172 relates to the notice to be given by the workman of injuries.

Section 3173 relates to arbitration of claims and to the reference of such claims to the Attorney General of the State and to the method of bringing suit for compensation.

Section 3174 refers to the preferential character of claims of workmen and provides that such claims shall not be subject to execution or attachment and shall not be assignable by the workman.

Section 3175 provides for the procedure in case the workman be mentally incompetent.

Section 3176 is as follows:

> "3176. This chapter shall be construed as a continuation of the law contained in Chapter XIV of the laws of the First Legislature of the State of Arizona, Second Session. All workmen employed by an employer at manual and mechanical labor of the kinds defined in section 67 (Par. 3165) of this chapter shall be deemed and held in law to be employed and working subject to the provisions of this chapter, and the employer and the workman shall alike be bound by and shall have each and every benefit and right given in this chapter the same as if a

mutual contract to that effect were entered into between the employer and the workman at any time before the happening of any accident. It shall be lawful, however, for the employer and workman to disaffirm an employment under the provisions of this chapter by written contract between them or by written notice by one to and served upon the other to that effect before the day of the accident;

Provided, such written contract does not provide for less compensation than as provided in this chapter. And in the absence of such written contract or written notice, served as above provided, it shall be taken and held that the employment and service is under this chapter; and the same shall be the sole measure of their respective rights and liabilities when and as provided in this chapter;

Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this chapter or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State Constitution, or the common law, except as herein provided, as his rights may at the time exist. . Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively." (Italics ours)

Section 3177 is as follows:

"3177. Any employer employing workmen to perform labor or services of other kinds than as defined in this chapter, and such workmen and employees may, by agreement, at any time during the employment, accept and adopt the provisions of this chapter as to liability for accident, compensation, and the methods and means of paying and securing and enforcing the same. And in every such case the provisions of this chapter shall be taken in law and fact to bind the parties as fully as if they were specifically mentioned and embraced in the provisions of this chapter."

Section 3178 is as follows:

"3178. This chapter is remedial in its purpose and shall be construed and applied so as to secure promptly and without burdensome expense to the workman the compensation herein provided and apportioned so as to provide support during the periods named for the loss of ability to earn full wages."

Section 3179 is as follows:

"3179. Nothing in this chapter shall be deemed or taken to repeal or affect in any way any other acts or laws passed by the first legislature of the State of Arizona, and in so far as

refers to the same subject in other acts it shall be deemed to be cumulative only."

Construing these statutes the Supreme Court of the State of Arizona has said:

"Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const., secs. 4, 5, art. 18. (2) Employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const., sec 7, art. 18. (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover of the employer. Const., sec. 8, art. 18." Consolidated Ariz. S. Co. vs. Ujack 15 Ariz. 382; 138 Pac 465.

The foregoing construction by the Supreme Court of the State of Arizona of the laws relating to the remedies of an injured workman has not been changed nor modified by that tribunal, and it is, therefore, safe to proceed upon the hypothesis that the injured workman has, assuming that he re-

ceived his injuries while engaged in a hazardous occupation as declared and defined by the law, the three remedies above named from which to choose. It remains to be seen when and in what manner the workman is required under the law to elect which of the three remedies he will pursue and when such election becomes final and conclusive.

THE BRINGING OF A SUIT IS THE DECISIVE ACT WHICH CONSTITUTES AN EXCLUSIVE ELECTION OF REMEDIES.

The provisions of the constitution are silent as to when an election shall be made, except insofar as such election may be affected by the following language found in Section 8, Article XVIII of the Constitution.

> "Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

Section 14 of the Workman's Compulsory Compensation Act, being Paragraph 3176 of the Revised Statutes of Arizona, 1913, reads as follows:

> "Sec. 14. This act shall take effect on the 1st day of September, 1912; and ten days from and thereafter, it shall be taken and held in law that all workmen then in the employ, and

all workmen afterward employed by an employer at manual and mechanical labor of the kinds defined in section 3 of this act, are employed and working under this act, and the employer and workman shall alike be bound by and shall have each and every benefit and right given in this act the same as if a mutual contract to that effect were entered into between the employer and the workman at any time before the happening of the accident. It shall be lawful, however, for the employer or workman to disaffirm an employment under the provisions of this act by written contract between them, or by written notice by one to, and served upon, the other to that effect before the day of the accident; provided, that such written contract does not provide for less compensation than as provided in this act. And in the absence of such written contract or written notice, served as above provided, it shall be taken and held that the employment and service is under this act; and the same shall be the sole measure of their respective rights and liabilities when and as provided in this act; provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this act or to proceed under or rely upon the provisions hereof for relief, *then the other may pursue his remedy or make his defense under other existing statutes, the state Constitution or the common law, except as here-*

in provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively." (Italics ours)

It is apparent from a reading of the last quoted section that it was the intention of the legislature to make the provisions of the Workman's Compulsory Compensation Law a part of the contract of employment between the employer and employee, where the work engaged in was hazardous as defined by said Workman's Compensation Act, unless either the employer or employee should by a written notice, disaffirm any intention of coming within such Act.

However, it has been determined by the Supreme Court of the State of Arizona in the case of Consolidated Ariz. S. Co. v. Ujack, supra, that any expression in the Workman's Compulsory Compensation Act that seemingly requires that the employee shall elect in advance of his injury his remedy, is unconstitutional in the light of the language found in Section 8, Article XVIII of th eConstitution, reading as follows:

"Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

We may, therefore, consider it to be settled law that the injured workman has a constitutional right

after he has been injured, to either accept the compensation prescribed by the Workman's Compulsory Compensation Act or to sue his employer as provided by the Constitution,—that is, either at common law or under the Employers Liability Law.

In taking this view of the rights of the workman we find that the Legislature in the last part of Section 14 of the Workman's Compulsory Compensation Act, above quoted, provides as follows:

> "*Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.*"

This language is in consonance with the provisions of the Constitution and clearly and unequivocally states when and in what manner an election shall be made and the effect of such an election. The bringing of a suit is an election by the workman. The effect of such election is to exclude all other remedies. This language of the statute is so simple and clear as to require no construction by the courts.

However, the Supreme Court of the State of Arizona is discussing the question of election in the case of Consolidated Ariz. S. Co. v. Ujack, supra, in an opinion written by Judge ROSS has the following to say:

> "The last sentence of Section 14 reads:
>
> 'Any suit brought by the workman for a re-

covery shall be held as an election to pursue tains a plain declaration of the Legislature that such remedy exclusively." This sentence con- the employee is at liberty to pursue any of the remedies provided by law until he adopts one by instituting a suit for redress, when the one adopted becomes exclusive'."

And Judge CUNNINGHAM in an opinion dissenting in part in the foregoing case, uses the following language:

> "If, after the accident, he fails to claim the statutory compensation in the manner and within the time prescribed, and if he has claimed the compensation and fails to show that the employer and he have failed or refused to adjust all questions that have arisen between them in one of the modes prescribed, such failures to make due claim or to settle the questions clearly operate as defenses, *but the commencement of such suit shall be held an election to pursue such remedy exclusively, and no other remedy is thereafter available to him.* (Italics ours) If, upon the other hand, he commences an action for the recovery of damages, without regard to the provisions of the act, then he is not permitted to abandon such suit and resort to his statutory remedy to enforce the compensation prescribed by the act."

Prior to the adoption of the Constitution of the State of Arizona the injured workman was limited in his recovery to the remedy afforded under the common law based upon negligence of the employer, and subject to the defenses afforded by that law to such employer. By the adoption of the Workman's Compulsory Compensation Law and the Employers' Liability Law, the workman engaged in a hazardous occupation was given remedies theretofore unknown to our law, and remedies not based upon any wrong upon the part of the employer, and subject to no defenses save the defense that the injury was caused by the negligence of the injured.

However, the new remedies granted to the workman, being strictly statutory in character, the workman must bring himself within the clear provisions of the law before he will be permitted to recover under the statutory remedy.

In this instance, the statute in express language and without conditions or limitations attached to the rule, says, that the bringing of an action constitutes an election and that this election is conclusive. The defendant in error by his own voluntary act excluded the remedy afforded by the Employers' Liability Law from the remedies available by electing to bring suit under the common law.

STATUTE DECLARING BRINGING OF SUIT AN ELECTION OF REMEDY IS MERELY DECLARATORY OF RULE GENERALLY ADOPTED.

The Legislature of the State of Arizona in declaring by the statute above mentioned that the bringing of a suit should constitute an election of one of the co-existing remedies merely adopted the rule generally recognized. It has been held by numerous courts that the commencing of an action to enforce one of two or more remedial rights arising out of the same facts is such a decisive act as constitutes a conclusive election barring a subsequent prosecution of inconsistent remedial rights.

Eilers Music House v. Douglass,
156 Pac. 937. (Wash.)

Grizzard v. Fite,
191 S. W. 969. (Tenn.)

Frisch v. Wells,
86 N. E. 775. (Mass.)

Stinson v. Sneed,
163 S. W. 989 (Tex.)

Farwell v. Myers,
26 N. W. 328. (Mich.)

Missouri Pac. Ry. Co. v. Henrie,
65 Pac. 665 (Kan.)

Blaker v. Morse,
55 Pac. 274. (Kan.)

Sweet v. Montpelier Sav. Bk. & T. Co.
77 Pac. 538, (Kan.)

Robb v. Vos,
15 S. Ct. 4;
155 U. S. 13.

City Nat'l Bank of Saratoga Springs v. Wetsel,
88 N. Y. S. 1079. (N. Y.)

Wright-Barrett & Stilwell Co. v. Robinson,
82 N. W. 632 (Minn.)

Kennedy v. Manry,
66 S. E. 29 (Ga.)

Blank v. Independent Ice Co.,
133 N. W. 344 (Iowa.)

NO SHOWING MADE BY DEFENDANT IN ERROR IN EFFORT TO ESCAPE THE EFFECT OF HIS ELECTION BY BRINGING SUIT UNDER THE COMMON LAW.

We contend that the language of the statute when it says "any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively," admits of no qualifications or exceptions and that one who voluntarily brings a suit at common law thereby makes his exclusive election and cannot thereafter by amendment or otherwise, substitute any other action for the one brought.

However, it may be contended that where the suit is brought under a misapprehension of the facts or of the law that the plaintiff should have a right to rectify such mistake by substitution of causes of action. While we do not agree that there is any such right under a statute where the language is so clear and explicit as we find here, yet we say

that even if such be the law, the defendant in error has not brought himself within the requirements of the law with respect to such substitution. A careful analysis of the facts related in the several amended complaints shows conclusively that there was no material difference insofar as the facts surrounding the injury are concerned, between the original complaint filed under the common law and the several amended complaints. Furthermore, the defendant in error was in as good a position to know of the facts and circumstances at the time he filed his original complaint based upon the common law, as he was at any subsequent time. He was not dependent upon anyone other than himself for his knowledge of the facts and circumstances. At the time he filed his original complaint these facts and circumstances were fresh in his memory. Furthermore, at no time or place has the defendant in error alleged either in his pleadings or affidavits in support of his amendments that he acted in ignorance of either the facts or the law, except that defendant in error claimed to be in ignorance of the character and severity of the injuries received, and upon such lack of information asked the privilege of amendment. This lack of information, of course, has no bearing upon his right of recovery. We believe it to be the rule upheld by authority and supported by reason that to escape the effect of an election made by bringing suit, it is incumbent upon the one seeking to do so to show that at the time of the institution of the suit he was ignorant of either the facts

or the law. Baker v. Brown Shoe Co., 95 S. W. 808.

A party having two inconsistent remedies is bound by an election made with full knowledge of the facts and cannot thereafter pursue the other remedy merely because it promises better results. Blaker v. Morse, 55 Pac. 274. (Kan.)

ELECTION OF REMEDIES INVOLVES SUBSTANTIAL RIGHTS.

The substitution of a cause of action under the Employers' Liability Law of the State of Arizona for an action originally commenced under the common law is not a mere technical change. The two actions are greatly different.

The liability under the Employers' Liability Law is strictly statutory and involves no wrong on the part of the employer and is not based upon negligence in any degree. Proof of contributory negligence on the part of the employee does not act as a bar to a recovery but may be shown only for the purpose of mitigation of damages. Under the Employers' Liability Law there is no defense available to the employer save and except the fact that the accident was caused by the negligence of the employee.

Under the common law in the State of Arizona proof of negligence on the part of the employer is necessary and the right of recovery of the employee is subject to all of the common law defenses, save

and except the fellow servant defense. We, therefore, say that the matter of election is one of utmost importance.

CONCLUSION.

In conclusion we earnestly contend for the reasons above stated that the trial court by permitting a substitution of a cause of action under the Employers' Liability Law of the State of Arizona for a cause of action under the common law, and in permitting the defendant in error to go to trial upon such cause of action, and in rendering judgment thereon, committed errors which entitle the plaintiff in error to a reversal of this action.

Respectfully submitted,

RICHARD E. SLOAN,
C. R. HOLTON and
E. G. SCOTT,
Attorneys for Plaintiff in Error.